IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

Appeal No.ll0 of 2005
in
Summons for Judgment no.979 of 2002
in
Sum Suit No. l773 of 2002

Vasant Bhagwatiprasad Anil & ors ..Appellants
vs
M/s Bharwant Bros & ors...Respondents

Dr.V.V.Tulzapurkar i/b M.J.Devani for appellants
Mr. P.S.Gidwani with Mrs Wadia Bhatia for respondents

CORAM: A.P.SHAH & S.J.VAZIFDAR JJ.

Dated l8.3.2005

P.C:

. Admit. Learned counsel for respondents waive service. By consent, Appeal is called out for hearing.

2. This Appeal is directed against an order passed by the learned single Judge in a Summary Suit granting conditional leave to Defendant nos.l and 2 on their depositing a sum of Rs l7 lacs. The Plaintiffs have filed the present suit for recovery of Rs.32.38 lacs with interest on principle amount of Rs. l7 lacs at the rate of 24% per annum. The case of the Plaintiffs is that they lent and advanced to the Defendants l and 2 a sum of Rs. l7

lacs under an agreement dated 5.ll.l998 and under a subsequent agreement dated l4.7.2004 in para 9 of the said agreement the amount which was due and liable to the Plaintiffs was confirmed by Defendants l and 2. Thus both Defendants had in unequivocal terms agreed that they are jointly and severally liable to pay to the Plaintiffs.

3. As Summons for Judgment taken out by Plaintiffs to which affidavit in reply by Defendants l and 2 was filed. The learned single Judge came to the conclusion that Defendants had no real defence to the suit and granted leave subject to deposit of Rs.l7 lacs.

4. The Plaintiffs' suit is based on two agreements dated 5.ll.l998 and l4.7.2004 annexed at Exhibits A and B to the plaint. Under agreement dated 5.ll.l998 it is recorded that the Plaintiffs have lent and advanced to Defendant no l a total sum of Rs.l7 lacs in the manner mentioned in clause l of the agreement. In Clause 2 it is stated that the Defendant no.l has agreed to repay without any default the loan of Rs. l7 lacs to Plaintiffs on or before 30.l2.l998. Clause 3 then recites that the loan of Rs.l7 lacs is secured by the flat of

Defendant no.l being flat no. l0l,lst floor, Shiv Lila, 57, Alibhai Premji Road, Grant Road, (E) Mumbai. Clauses 7 & and 8 of the agreement which are relevant for our purpose read thus:

> "7.I further say that until such time the said loan amount of Rs.l7,00,000 or any part thereof or any costs charges and expenses incurred in respect thereof is due, outstanding and payable by me or from me to the said M/s Bharwani Bros. & Co. I shall not sell, transfer or otherwise alienate the said premises or let, sub-let or under-let the same or part with possession thereof or any part thereof or create any mortgage, charge or lien in respect of the said premises or create any third party right or interest therein or otherwise deal with the same in any manner whatsoever or howsoever so as to in any way prejudicially affect the security hereby created therein in favour of the said M/s Bharwani Bros. & Co, to ensure repayment of the said loan together with cost, interest, charges and expenses, as aforesaid.

8. I further say that I am using the said premises for the purpose of my partnership firm of M/s Aaksha Impex in addition to my sole proprietor concern of M/s Action Electronics. However, none of my partners in the said firm of M/s Aaksha Impex have any right by way of tenancy, sub-tenancy or leave and licence or otherwise whatsoever or howsoever in the said premises or any part thereof. I hereby agree that in the event of the said premises being required to be sold in enforcement of the above security then, in that event, I and my other partners in the said firm M/s Aaksha Impex shall forthwith quit, vacate and hand over quiet, peaceful and vacant possession of the said premises to the purchaser/ transferee thereof."

5. At the foot of the agreement following endorsement is made by Defendant no. 2 in his capacity as partner of M/s Aaksha Impex, which reads as under:

"We, the partners of M/s Aaksha Impex, do hereby jointly and severally confirm what is stated in the foregoing declaration, by our partner, Shri Vasant Bhagwati Prasad

Anil.
For Aaksha Impex
sd/-
Partner"

6. The agreement dated 23.6.l999 is on the same line save and except the principal amount mentioned therein is Rs.l6 lacs . This agreement is also confirmed by Defendant no. 2 in his capacity as partner of M/s Aaksha Impex.

7. On plain reading of relevant clauses of the above agreements it is clear that the loan was taken by Defendant no.l alone and Defendant no. 2 has not undertaken any liability to repay the same. It appears that the flat which is given as a security is in possession of M/s Aaksha Impex in which Defendant nos.l and 2 are partners and it is agreed by the said firm that in the event of flat being required to be sold in enforcement of the security in that event partners of M/s Aaksha Impex

shall vacate the premises and hand over quiet, vacant and peaceful possession of the flat to the purchaser/transferee thereof. Therefore it is clear that Defendant no.2 is not personally liable as he is neither a borrower nor guarantor. Consequently Defendant no. 2 would be entitled to unconditional leave . In so far as Defendant no.l is concerned he is the borrower and he has expressly undertaken to pay this amount in terms of the two agreements referred to above.

8. In the circumstances Appeal is partly allowed. Unconditional leave is granted to Defendant no. 2. Defendant no.2 to file written statement within 8 weeks. The order of the learned single Judge stands confirmed so far as Defendant no.l is concerned. Defendant no.l is granted 4 months time to deposit the amount.

. In view of the above order no orders on Notice of Motion no.52l of 2005.